IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE KURIAN JOSEPH
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

TUESDAY, THE 27TH FEBRUARY 2007 / 8TH PHALGUNA 1928

Mat.Appeal.No. 100 of 2005()

AGAINST THE ORDER IN EP 69/96 IN
OS.337/1993 of FAMILY COURT,TRIVANDRUM
.....

APPELLANT/PETITIONER (DECREE HOLDER)

S.SREERANJINI,
THAZHATHUVILAKOM VEEDU,
EDAGRAMAM, KARUMAM, NEMOM VILLAGE,
THIRUVANANTHAPURAM.

BY ADV. SRI.V.S.BABU GIREESAN
ADV. SMT.K.PREETHA JOHN

RESPONDENT/RESPONDENT(JUDGMENT DEBTOR)

RAJAN, RAJA NIVAS,
MADHAVAPURAM, VELI, THIRUVANANTHAPURAM.

BY ADV. SRI.G.UNNIKRISHNON
ADV. SRI.B.JAYASURYA

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON 27/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

KURIAN JOSEPH & K.T. SANKARAN, JJ.

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MAT. APPEAL No. 100 OF 2005

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Dated this the 27th February , 2007

J U D G M E N T

Sankaran, J:

In O.S. No. 337 of 1993 , the Family Court, Thiruvananthapuram passed a decree against the respondent herein for realisation of a sum of Rs. 1,18,576/- . The appellant is the wife of the respondent. The suit was filed for realisation of the value of the gold ornaments allegedly misappropriated by the respondent. The suit was decreed.

2. Wife filed Execution Petition No. 69 of 1996. Respondent -husband pleaded no means. Before the Family Court , P.Ws. 1 and 2 and C.PW.1 were examined and Exts. A1 to A3, B1 to B5 and X1 were marked. P.W2 was examined to show that respondent is having business. It was contended by the petitioner -appellant wife that the respondent is running a pan shop at Madhavapuram , a marble shop at Kumarapuram and that he is having money lending business. It was contended by the wife that the

judgment debtor has a monthly income of Rs. 10,000/- and he has telephone connection, the subscriber number being 502769. Respondent was working in a Gulf country and after he returned to India he did not go abroad again . It was contended by the husband that he was constrained to stay here because of the interim injunction granted at the instance of the wife. The judgment debtor in his evidence submitted that he has no job and that he has no income.

3. The court below dismissed the execution petition on the ground that the decree holder has not proved what business, the judgment debtor was conducting. It was also held that there is no documentary evidence to prove that the judgment debtor has means to pay the decree debt. As regards the money lending business, the court below held that there is no documentary evidence to prove the same. The court below further held that simply because the respondent is having a telephone connection, it cannot be assumed that he has sufficient means to pay the decree debt.

4. Learned counsel for the appellant contended that the question of

no means in praesenti is not at all relevant as the judgment debtor was bound in a fiduciary capacity to satisfy the decree. It is also contended that clause (c) of proviso to Sec. 51 of the Code of Civil Procedure is applicable in this case and in such a case, the question whether the judgment debtor is having present means to pay or has had the means after the decree was passed, is absolutely irrelevant. He cited the decision reported in **1990 (2) K.L.T. 983 (Francis vs. Central Bank of India)** to support his contention. Counsel for the respondent on the other hand relied on the decision of the Supreme Court reported in **1980 KLT 375 (Jolly George Varghese vs. Bank of Cochin).**

5. We are of the view that the decision of the Supreme Court in **Jolly George's** case is not applicable to this case since if clause (c) of the proviso to Sec. 51 applies, the conditions to be satisfied under clause (b) of the proviso to Sec. 51 are not applicable. The court below has not considered the case in the light of clause (c) of the proviso to Sec. 51 of the Code of Civil Procedure, evidently, since such a contention was not raised by the decree holder. The nature of the decree and the question

whether the respondent was bound to satisfy the decree in his fiduciary capacity are all matters to be considered by the executing court. The full facts are not brought in evidence before the executing court. In view of the fact that the petitioner/appellant did not raise such a contention on the basis of clause (c) of the proviso to sec. 51 of the Code of Civil Procedure and since the court below had not considered the matter in that respect, we are of the view that the matter requires fresh consideration by the court below. The court below shall decide the execution petition afresh after affording an opportunity of being heard to both parties. The court below shall consider the question whether clause (c) of the proviso to sec. 51 is attracted in the case and shall decide the case accordingly in the light of the observations mentioned above and the decisions referred to above within a period of two months from the date of receipt of a copy of this judgment. The order of the court below is set aside. The parties are at liberty to adduce such other relevant evidence as they wish to adduce. Since the matter is being remanded, the court below shall consider all the questions involved in the case afresh including the question whether the

judgment debtor has or has had since the date of the decree the means to pay the decree debt or a substantial portion thereof and whether he refused or neglected to pay.

Matrimonial Appeal is allowed as above.

SD/-
KURIAN JOSEPH,
JUDGE.

SD/-
K.T. SANKARAN,
JUDGE.

/true copy/

P.A. TO JUDGE

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